TRIALS—ARGUMENT OF COUNSEL—RIGHT OF PLAINTIFF TO RECOVER FROM THIRD PARTY.—In an action by a motorman for injuries against the owner of a truck with which his car had collided, the complaint alleged that the plaintiff had elected to sue the defendant for negligence instead of making a claim against his own employer under the workmen's compensation statute. A verdict was found for the defendant and the plaintiff appealed. *Held,* that it was not reversible error for the defendant's counsel to urge that even if the plaintiff lost he could recover compensation from his employer, since the plaintiff had pleaded the compensation statute. *Youngs* v. *Cohen* (1917) 167 N. Y. Supp. 160.

Since the issue before the jury is concerned only with the merits of the case as between the plaintiff and defendant, the law is clear that evidence of the ultimate liability of someone other than a party to the suit is irrelevant and being highly prejudicial will furnish sufficient grounds for reversal. *Brown* v. *City of Scranton* (1911) 231 Pa. 593, 80 Atl. 1113; *Maraglino* v. *Comes* (1915) 90 Misc. 297, 153 N. Y. Supp. 579. Consequently, evidence is inadmissible that the plaintiff has a separate cause of action against an insurance company, *Fitzgibbons* v. *Schenectady Ry. Co.* (1914) 160 App. Div. 66, 145 N. Y. Supp. 401, or that the defendant is insured against liability, *Lone Star Brewing Co.* v. *Voith* (Tex. Civ. App. 1905) 84 S. W. 1100, and it has even been held that it was reversible error to allow the defendant to be asked whether he was not insured though he did not answer and though the jury was instructed to disregard the question. *Levinski* v. *Cooper* (Tex. Civ. App. 1912) 142 S. W. 959. However, where the evidence on the merits is strongly in the plaintiff's favor, a reasonable verdict for him will not be disturbed, *Tanner* v. *Harper* (1904) 32 Colo. 156, 75 Pac. 404, and where one of the parties brought out the fact of his own insurance on cross examination it was held that he could not complain that continual references by the other party to such fact influenced the verdict. *McTague* v. *Dowst* (1900) 51 App. Div. 206, 64 N. Y. Supp. 949. Since the allegations contained in the pleadings, though not put in evidence may be called to the attention of the jury, *Field* v. *Surpless* (1903) 84 App. Div. 268, 82 N. Y. Supp. 127, the holding of the principal case seems correct.

TRUSTS—MINGLING OF TRUST FUND BY TRUSTEE EX MALEFICIO—PRESUMPTION.—The bank of which defendant was receiver had, by concealing its insolvency, induced the intervener to become a stockholder, and had mingled the money received in exchange for the stock with its other funds. At all times subsequent there was in the commingled mass more than the amount secured from the defendant, but the entire fund would have been exhausted by withdrawals but for deposits later than that of the money secured from the intervener. On a previous appeal, it had been held that the intervener was entitled to rescind the sale of the stock to him. See 13 Columbia Law Rev. 62. *Held,* since the bank was a trustee merely *ex maleficio,* it would not be presumed that it had intended to preserve the trust fund, and thus the identity of the latter was lost. *People* v. *California Safe Deposit & Trust Co.* (Cal. 1917) 167 Pac. 388.

When there are constant deposits in and withdrawals from a fund, it is generally presumed that the money is withdrawn in the order in which it is deposited. *Clayton's Case* (1816) 1 Meriv. 572; *Bank* v. *McNair* (1894) 114 N. C. 335, 19 S. E. 361. But when a person acting

in a fiduciary capacity deposits his own money and that belonging to the *cestui* in one account, and then draws against the combined fund, he will be considered as not intending any wrong, and it will be presumed that he draws out his own money first. *In re Hallett's Estate* (1879) 13 Ch. D. 696. But the *cestui* cannot obtain preference when the fund has been entirely expended by the fiduciary, *Slater* v. *The Oriental Mills* (1893) 18 R. I. 352, 27 Atl. 443, and if, at any time, the combined fund has contained less than the amount of the trust fund, he can obtain only the balance left at that time, *Board of Com'rs* v. *Strawn* (C. C. A. 1907) 157 Fed. 49, for there is no presumption that the fiduciary, having once withdrawn the trust money, intends to replace it. It would seem, however, that the exception should apply as well in the case of a trust imposed by operation of law as in the case of an express fiduciary relationship, *Importers and Traders' National Bank of New York* v. *Peters* (1890) 123 N. Y. 272, 25 N. E. 319; *In re Stewart* (D. C. 1907) 178 Fed. 463; *contra, First State Bank* v. *Oelke* (1910) 149 Iowa 662, 129 N. W. 70, and even though the defendant had only constructive notice of the trust, *Weiss* v. *Haight & Freese Co.* (C. C. 1907) 152 Fed. 479, for one who wrongfully mingles trust funds should be allowed to take out only what he can prove to be his. 2 Perry, Trusts (6th ed.) § 828; *Harrison* v. *Smith* (1884) 83 Mo. 210.

WATERS AND WATER COURSES—FROZEN PUBLIC WATERS AS HIGHWAYS—RIPARIAN RIGHTS.—Defendant company, a riparian owner, discharged heated water into the frozen river so that the ice melted. Plaintiff's son skated into the open water and was drowned. *Held,* it was at least a question for the jury whether the defendant, in the exercise of reasonable prudence, should have provided a guard, and further, to determine whether deceased was guilty of contributory negligence. *Parsons* v. *E. I. DuPont DeNemours Powder Co.* (Mich. 1917) 164 N. W. 413.

The public has the right to use the ice of public waters as a highway for travel or recreation, *French* v. *Camp* (1841) 18 Me. 433; see, *People's Ice Co.* v. *Davenport* (1889) 149 Mass. 322, 21 N. E. 385; Gould, Waters (3rd ed.) § 111, and people cutting ice on such waters are bound within reason to protect travelers from the holes thus made. *Woodman* v. *Pitman* (1887) 79 Me. 456, 10 Atl. 321; *Pennock* v. *Mitchell* (1908) 17 Ont. L. R. 286. A riparian owner is in no better position in this respect. As an owner he has the right to use the stream reasonably so as not to interfere with public or private uses. See, *Beidler* v. *Sanitary Dist. of Chicago* (1904) 211 Ill. 628, 71 N. E. 1118. When the stream is in a fluid state he is under a duty not to impair its navigability. *Gerrish* v. *Brown* (1863) 51 Me. 256. There is no reason why his liability should change when the river freezes. Discharging heated water into it so as to melt the ice is an unreasonable user as against the right to cut ice. *Sandusky etc. Co.* v. *Dixon etc. Co.* (C. C. A. 1915) 221 Fed. 200; see, *Walker Ice Co.* v. *American etc. Co.* (1904) 185 Mass. 463, 70 N. E. 937. It certainly is a precarious user as against the public right of travel and ought to subject the owner to the same reasonable obligation as is imposed on any person who cuts ice, *i. e.,* to guard the opening; especially since cutting ice is a public right while using the water is merely a private one. The holding in the principal case is well within the principles established by the above cases and it may be further supported by the analogous decisions holding that an abutting owner on a public road is under